

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of: :  
:   
Bruce A. Rogers :   
:   
Application No.: 10/763,870 : Group Art Unit: 3732  
:   
Filed: January 23, 2004 : Examiner: R.A. Running  
:   
For: HAIR HOLDING DEVICE WITH :   
ELASTIC CLOSURE OPERATION :   
:   
Atty. Docket No.: ROG030.10001 :

I, John F. Letchford, Registration No. 33,328, certify that this correspondence is being deposited with the U.S. Postal Service as first class mail in an envelope addressed to Mail Stop Appeal Brief - Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450 on January 16, 2009.

  
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John F. Letchford

Mail Stop Appeal Brief - Patents  
Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

Sir:

RESPONSE TO NOTIFICATION OF NON-COMPLIANT APPEAL BRIEF

In response to the Notification of Non-Compliant Appeal Brief dated January 14, 2009, Appellants respectfully submit herewith a compliant brief pursuant to 37 CFR § 41.37.

### REMARKS

On October 17, 2008, a Final Office Action was mailed to the undersigned. On October 31, 2008, Appellants timely filed a Notice of Appeal, Appellants' Brief Pursuant to 37 CFR § 1.192, and two (2) checks made payable to the Commissioner for Patents in the amount of \$270.00 each for payment of the respective filing fees for each submission.

On January 14, 2009, a Notification of Non-Compliant Appeal Brief was mailed to the undersigned.

Accordingly, Appellants respectfully submit an amended brief pursuant to 37 CFR § 41.37 in order to satisfy the requirements outlined in the Examiner's Notification of Non-Compliant Appeal Brief, namely the claims on appeal have been stated on page 2, Section III and the related appeals have been listed on page 24, Section X. The undersigned kindly requests that the Notice of Appeal dated October 31, 2008 as well as the prior payment of \$270.00 for the Notice of Appeal Fee and the payment of \$270.00 for the Appeal Brief Fee submitted in October, 2008, be applied to this newly submitted amended Appeal Brief. However, the USPTO is hereby authorized to charge any fees or credit any overpayment associated with this submission to Deposit Account No. 503-443.

In view of the foregoing, the instant application is believed to be in condition for docketing as an appeal. If the Examiner believes that a telephone interview would be beneficial to advance prosecution of the present application, the Examiner is invited to contact the undersigned at the telephone number listed below.

Respectfully submitted,

Date: January 16, 2009

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By: John F. Letchford  
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John F. Letchford

Mail Stop Appeal Brief - Patents  
Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

Sir:

APPELLANT'S BRIEF PURSUANT TO 37 CFR §§ 41.31 and 41.37

The above-identified application comes before the United States Patent and Trademark Office ("USPTO") Board of Appeals and Interferences ("Board") from a Final Rejection of claims 1-20 dated October 17, 2008.

I. REAL PARTY IN INTEREST

The real party in interest in the present appeal is the inventor, Mr. Bruce A. Rogers, 325 S. Camac St., #3F, Philadelphia, PA 19107.

II. RELATED APPEALS AND INTERFERENCES

The related appeals or interferences which may directly affect or be directly affected by or may have a bearing on the Board's decision in the presently pending appeal are listed in the "Related Proceedings Appendix" on page 24.

III. STATUS OF THE CLAIMS

The status of the claims in the application is as follows:

Claims 1-20 remain in the application in their originally-filed form and have been finally rejected. All of claims 1-20 are on appeal.

IV. STATUS OF AMENDMENTS FILED  
SUBSEQUENT TO THE FINAL REJECTION

No amendments were filed subsequent to the Final Rejection.

V. SUMMARY OF THE CLAIMED SUBJECT MATTER

Most broadly, the invention defined in the claims on appeal is addressed to a hair holding device in which a first body member, and a second body member are hingedly connected and are operable to grippingly engage a quantity of gathered hair strands. The claims on appeal include two (2) independent claims, claims 1 and 20.

The apparatus recited in independent claim 1 on appeal involves (with reference to specification page and line numbers

and drawing reference characters, where available, in parentheses):

a first body member and a second body member (specification at (a) page 8, lines 24-32; drawing ref. nos. 112, 114 (FIGS. 2-5), (b) page 11, lines 15-26; drawing ref. nos. 212, 214 (FIGS. 7A-7C), (c) page 16, lines 9-14; drawing ref. nos. 312, 314 (FIGS. 10 and 11), (d) page 16, lines 32-34; drawing ref. no. 414 (FIG. 12), (e) page 19, lines 25-28; drawing ref. nos. 612, 614 (FIG. 16), (f) page 19, lines 32-35; drawing ref. nos. 712, 714 (FIG. 17), (g) page 20, lines 4-7; drawing ref. nos. 812, 814 (FIG. 18), (h) page 20, lines 14-17; drawing ref. nos. 912, 914 (FIG. 19), and (i) page 20, line 32 through page 21, line 5; drawing ref. nos. 1012, 1014 (FIGS. 20A-20F)), said first and second body members comprising hair gripping portions (specification at (a) page 8, line 32, through page 9, line 1; page 9, lines 33-37; and page 10, lines 32-36 drawing ref. nos. 122, 122', 122'', 124, 124', 126, 128 (FIGS. 2-6 and 6A), (b) page 11, lines 28-31; drawing ref. nos. 222, 224, 226, 228 (FIGS. 7A-7C), (c) page 16, lines 9-14; drawing ref. nos. 322, 324, 326, 328 (FIGS. 10 and 11), and (d) page 17, lines 1-3; drawing ref. nos. 424, 428 (FIG. 12));

hinge means for pivotally connecting said first and second body members (specification at (a) page 8, lines 24-32; drawing ref. no. 116 (FIGS. 2 and 5), (b) page 11, lines 15-26 and page 14, lines 11-23; drawing ref. no. 216 (FIGS. 7A-7C, 9A and 9B), and (c) page 16, lines 9-14; drawing ref. no. 316 (FIGS. 10 and 11)); and

elastomeric means in contact with said first and second body members for biasing said first and second body members into a closed position and for conforming to gathered strands of a user's hair when said hair gripping portions come into contact with gathered strands of a user's hair (specification at (a) page 4, line 7 through page 5, line 22, (b) page 9, line 7 through page 10, line 31; drawing ref. no. 136 (FIGS. 2-5), (c) page 11, line 15 through page 13, line 5, and page 14, line 11 through page 15, line 33; drawing ref. no. 236 (FIGS. 7A-7C, 9A and 9B), (d) page 16, lines 15-31; drawing ref. no. 336 (FIGS. 10 and 11), (e) page 18, line 27 through page line 20; drawing ref. no. 536 (FIG. 15), (f) page 19, lines 25-28; drawing ref. no. 636 (FIG. 16), (g) page 19, line 32 through page 20, line 3; drawing ref. no. 736 (FIG. 17), (h) page 20, lines 4-13; drawing ref. no. 836 (FIG. 18), (i) page 20, lines 14-17; drawing ref. no. 936 (FIG. 19), and (j) page 20, line 32 through page 22, line 33; drawing ref. nos. 1036 (FIGS. 20A-20F)).

Claims 2-19 on appeal further enlarge upon the structure of the hair holding device of claim 1 to define various features which are believed to be representative of preferred aspects thereof.

The method of improving the hair holding capability of a hair holding device recited in independent claim 20 on appeal involves (with reference to specification page and line numbers and drawing reference characters, where available, in parentheses):

selecting a hair holding device comprising first and second pivotally connected body members (specification at (a) page 8, lines 24-32; drawing ref. nos. 112, 114 (FIGS. 2-5), (b) page

11, lines 15-26; drawing ref. nos. 212, 214 (FIGS. 7A-7C), (c) page 16, lines 9-14; drawing ref. nos. 312, 314 (FIGS. 10 and 11), (d) page 16, lines 32-34; drawing ref. no. 414 (FIG. 12), (e) page 19, lines 25-28; drawing ref. nos. 612, 614 (FIG. 16), (f) page 19, lines 32-35; drawing ref. nos. 712, 714 (FIG. 17), (g) page 20, lines 4-7; drawing ref. nos. 812, 814 (FIG. 18), (h) page 20, lines 14-17; drawing ref. nos. 912, 914 (FIG. 19), and (i) page 20, line 32 through page 21, line 5; drawing ref. nos. 1012, 1014 (FIGS. 20A-20F)), **said first and second body members comprising hair gripping portions** (specification at (a) page 8, line 32, through page 9, line 1; page 9, lines 33-37; and page 10, lines 32-36 drawing ref. nos. 122, 122', 122", 124, 124', 126, 128 (FIGS. 2-6 and 6A), (b) page 11, lines 28-31; drawing ref. nos. 222, 224, 226, 228 (FIGS. 7A-7C), (c) page 16, lines 9-14; drawing ref. nos. 322, 324, 326, 328 (FIGS. 10 and 11), and (d) page 17, lines 1-3; drawing ref. nos. 424, 428 (FIG. 12)); and

**providing said first and second body members with elastomeric means for biasing said first and second body members into a closed position and for conforming to gathered strands of a user's hair when said hair gripping portions come into contact with gathered strands of a user's hair** (specification at (a) page 4, line 7 through page 5, line 22, (b) page 9, line 7 through page 10, line 31; drawing ref. no. 136 (FIGS. 2-5), (c) page 11, line 15 through page 13, line 5, and page 14, line 11 through page 15, line 33; drawing ref. no. 236 (FIGS. 7A-7C, 9A and 9B), (d) page 16, lines 15-31; drawing ref. no. 336 (FIGS. 10 and 11), (e) page 18, line 27 through page line 20; drawing ref. no. 536 (FIG. 15), (f) page 19, lines 25-28; drawing ref. no. 636 (FIG. 16), (g) page 19, line 32 through page 20, line



3; drawing ref. no. 736 (FIG. 17), (h) page 20, lines 4-13; drawing ref. no. 836 (FIG. 18), (i) page 20, lines 14-17; drawing ref. no. 936 (FIG. 19), and (j) page 20, line 32 through page 22, line 33; drawing ref. nos. 1036 (FIGS. 20A-20F)).

Presently existing hair holding devices assume a wide variety of configurations. Several of these designs were discussed at length in the specification of the present application as well as during prosecution thereof. Regardless of their individual constructions, indeed, because of their structural peculiarities, none of these devices, including the hair holding devices and other apparatus disclosed in the references cited against the claims on appeal, is capable of producing the advantages afforded by the claimed invention now before the Board.

#### VI. GROUND OF OBJECTION/REJECTION TO BE REVIEWED ON APPEAL

A statement of each separate ground of objection or rejection Appellant wishes to be reviewed, including the basis of each ground of rejection is as follows:

(1) Claims 1-3, 5-10, 12-14 and 17-20 stand rejected under 35 U.S.C. §102(b) as being anticipated by Takashima (U.S. Patent No. 5,535,765).

(2) Claims 15 and 16 stand rejected under 35 U.S.C. §103(a) as being unpatentable over Takashima in view of Mooneyhan (U.S. Patent No. 4,554,934).

(3) Claims 4, 7 and 11 stand rejected under 35 U.S.C. §103(a) as being unpatentable over Takashima.

#### VII. ARGUMENT

- (1) Rejection of Claims 1-3, 5-10, 12-14 and 17-20 under 35 U.S.C. § 102(b) as being anticipated by Takashima

Claims 1-3, 5-10, 12-14 and 17-20 stand finally rejected under 35 U.S.C. § 102(b) as being anticipated by Takashima. Such rejection is respectfully traversed.

In a statement bridging pages 2 and 3 of the aforementioned Office Action, the Examiner sets forth her reasoning behind Takashima's alleged anticipation of Appellant's claims 1, 6, 8 and 9. As part of that statement, the Examiner asserts (with emphasis added):

With regard to claims 1, 6, 8-9, Takashima discloses a hair holding device (figs. 14-15) comprising a first body member (40a), a second body member (40b), the first and second body members having gripping portions (see attachment A), a hinge means (16) for pivotally connecting the first and second body members and an elastomeric means comprising at least one continuous elastomeric band (50) contacting the first and second body members in a looped configuration (fig. 15), the elastomeric means in contact with the first and second body members for biasing the first and second body members into a closed position (col. 9, lines 62-65).

The statement at column 9, lines 62-65 of Takashima to which the Examiner refers is reproduced below, with emphasis added.

Next, the manual force applied to the support members 200a and 200b is relaxed whereby the frames 100a and 100b begin to close the distal ends under the elastic restoring forces of the leaf spring 301 and elastic band 50.

Appellant respectfully objects to the Examiner's application of that statement for at least two reasons.

First, in the context of the Takashima patent, it is not used to describe the embodiment of the Takashima device shown in FIGS. 14 and 15. Rather, it is used to describe the embodiment of the Takashima apparatus shown in FIGS. 19-25.

Second, and more importantly, it is an incorrect statement, not only with respect to the specific embodiment of the Takashima device shown in FIGS. 19-25 but as to all embodiments of the invention described in that patent.

FIGS. 19-25 of Takashima depict a so-called "Fifth Embodiment" of the Takashima hair binder device. The written description of the "Fifth Embodiment" spans column 8, line 34-column 10, line 51. This is the only portion of the Takashima patent in which "elastic restoring forces" for closing the pivoted hair band holding frames are discussed. And, in that portion of the patent, the restoring forces are mentioned three times. In two of those citations, i.e., column 9, lines 24-33 and column 10, lines 24-35, only leaf spring 301 is described as providing the "elastic restoring force" for closing the device. There is good reason why these passages do not include the elastomeric hair holding band 50 as providing "elastic restoring force": it is because it does not provide such force, column 9, lines 62-65 notwithstanding.

In all embodiments of the Takashima apparatus, the hair binding elastic band 50 is in tension before, during and after it binds a shock of hair (identified as long hair "LH" in the Takashima drawing figures). An elastic band in tension, like a tension spring in tension, seeks to reach a lower energy level. That is, it seeks to contract when stretched. For an elastic

band stretched about the pivot axes 16 (FIGS 2-5 and 13-16), pivot axes 300 (FIGS. 19-26) and engaging pins 21 (FIGS. 6-12) of Takashima, that contraction can only occur about the pivot axis or pivot pin, as the case may be, with the pivot axis or pivot pin serving as the fulcrum for the contraction. Under these circumstances, therefore, the stretched elastic band tends to pull the variously disclosed frame members open rather than push them closed.

To confirm this physical fact, the undersigned fashioned a model of a pivoted frame assembly analogous to several of the pivoted frame assemblies shown in the Takashima patent from a hinge in response to a similar rejection of Appellant's claims raised in an Office Action dated January 11, 2005.<sup>1</sup> At their distal ends, the arms of the hinge were bent inwardly toward one another to simulate the first elastic band engaging structures shown in Takashima that engage the opposite ends of an elastic band to be placed about a user's hair. Consistent with the first elastic band engaging structures shown in Takashima, the inwardly bent ends of the hinge arms in the model were essentially in alignment with the pivot axis of the hinge when the hinge arms were in a "closed" position. To test the theory at issue, the undersigned placed one end of a rubber band on one of the inwardly bent rubber band engaging structures formed into one of the hinge arms, stretched the band around the hinge axis and seated the opposite end of the rubber band on the other inwardly bent rubber band engaging structure formed into the

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<sup>1</sup> The undersigned has since misplaced that assembly. However, all of the statements made herein in connection with that assembly remain true and are (other than certain expressions of verbal tense) exact reproductions of statements made by the undersigned in a February 16, 2005 Request for Reconsideration offered in reply to the January 11, 2005 Office Action concerning Takashima.

other of the hinge arms. During this rubber band placement process, it was necessary for the undersigned to squeeze the hinge arms together to maintain the hinge arms in their "closed" position. This led the undersigned to conclude that the arms would be pivoted from a closed to an open position due to the contraction of the rubber band upon removal of the manually applied closing force. Indeed, the undersigned avers that that is precisely what happened when the manual closing force was removed from the hinge arms. If need be, and if permitted by the Board at this advanced stage of prosecution, the undersigned is ready and willing to introduce into the record a declaration executed by him attesting to the facts of that experiment.

In addition, Appellant fabricated a model device which is highly similar in construction to the circular, ring-like, hinged, two-part hair clip shown in FIGS. 2-6, 9-13 and 15-18 of Takashima. In Appellant's model device, a rubber band was stretched around the hinge axis of the device and opposite ends of the rubber band are received in engaging structures formed at the distal ends of the hinged arms. Attached hereto as Exhibit A in Section IX hereof, "EVIDENCE APPENDIX", are a series of photographs of that device which show, in sequence, (1) the hinged, two-part ring and elastic rubber band as separate components (Sheet 1 of 5), (2) the band mounted on the ring with the ring fully closed (Sheet 2 of 5), (3) the band mounted on the ring with ring partially open (Sheet 3 of 5), (4) the band mounted on the ring with the ring more open (Sheet 4 of 5), and (5) the band mounted on the ring with the ring fully open to the point the band is in a completely relaxed state (Sheet 5 of 5).

As seen in those photographs, Appellant's device performs exactly the same as the device made by the undersigned and described above. That is, Appellant's model device requires one to forcibly hold the opposed pivoted ring members in a "closed" condition in opposition to the tensile force of the elastic band extended about the device's pivot axis. As "closing" or squeezing force is gradually decreased, the tension of the band causes the pivoted ring members to open. If permitted by the Board at this advanced stage of prosecution, Appellant is ready and willing to introduce into the record a declaration executed by him attesting to the facts regarding operation of his device. Still further, the undersigned and Appellant are willing to meet personally with the reviewing members of the Board in an Oral Hearing to demonstrate Appellant's model of the Takashima device. However, the time and travel costs associated with such a brief demonstration (it would literally be completed in a matter of seconds) would be quite substantial and Appellant would prefer not to incur them if not absolutely necessary.

In light of the foregoing physical evidence, the passage at column 9, lines 62-65 of Takashima is clearly erroneous, at least as to the elastic band 50. And, the Takashima patent is otherwise silent with regard to the elastomeric means specifically called for in Appellant's independent claim 1 and its method counterpart, independent claim 20, namely,

elastomeric means in contact with said first and second body members for biasing said first and second body members into a closed position and for conforming to gathered strands of a user's hair when said hair gripping portions come into contact with gathered strands of a user's hair.

In point of fact, as revealed in the experiments conducted by Appellant and the undersigned, the pivoted frame members of a device constructed analogously to those shown in the Takashima patent will be pulled apart rather than pushed together under the influence of an elastic band in tension stretched about their common pivot axis. This is in diametric conflict with the effect achieved by the elastomeric means set forth in Appellant's independent claims 1 and 20.

Thus, the elastic band in Takashima operates at cross-purposes against any spring that might be present whose specific function it is to close the device. Hence, the very presence of the elastic band requires a stronger spring than otherwise would be necessary if the band were not present. By contrast, the presently claimed invention makes possible the use of a weaker spring than would otherwise be necessary because of the presence of the elastomeric means which bias the first and second body members into a closed position.

Further, the Takashima device does not secure hair when open; it only serves to secure hair when the device is closed. In contrast, the present invention secures hair even when partially closed.

In addition, once hair is placed into the Takashima device, one must squeeze the device into a closed position. The open V-shaped configuration of the tensioned elastomeric band will always prevent the device from closing completely, unless the device is squeezed shut by hand. Hence, unless the device closes completely, it will be useless and fall out of the hair. This is

a major drawback. In stark contrast, the presently claimed hair holding device and method result in a device which automatically closes around hair when released. This makes the present invention easier to use than, say, barrettes. Jaw clips are popular because they can be easily adjusted in the hair without fuss and muss. No other type of hair device, including Takashima, has this advantage.

Further, in the Takashima device an elastic hair band is initially stretched about a pivot axis or hinge pin (ref. nos. 16, 21 and 300 in the Takashima drawing figures). As the device is squeezed by a user, the elastic band (14, 50) eventually slides from slanted surfaces (16a, 300a) formed on the pivot axis or hinge pin whereby it is launched by release of its inherent tensile potential energy toward the shock of hair to be engaged. However, the sudden transfer of the elastic band toward the hair is not predictable or reliable. That is, a problem results from timing of (1) the elastic band's intended sliding off of the pivot axis or hinge pin, (2) subsequent engagement of the elastic band with a shock of hair, and (3) closure of the device's latch hooks or pins (which latch hooks or pins, incidentally, are neither present in nor required for operation of the present invention as they are in Takashima). Simply put, if the elastic band in Takashima slides from the device's pivot axis or hinge pin before the elastic band's closure pins or hooks (ref. nos. 12, 51) engage the band, then at least some hair will be pushed out of the band and the closure pin or hook will not fully enclose all of the hair. This is not a concern with Appellant's device because the presently disclosed and claimed elastomeric means is not designed, constructed or arranged to be stretched about and "launched" from the pivot axis or hinge pin of the first and second body members.



Finally, Appellant wishes to address the points raised by the Examiner in the order presented in the "Response to Arguments" section at page 5 of the Final Rejection.

First, the Examiner states (with emphasis added):

Appellant has argued that the recitation of the elastomeric means for biasing the first and second bodies into a closed position in col. 9, lines 62-65 was applied for another embodiment other than for the embodiment in figures 14 and 15. It is agreed; however, Appellant is noted that the elastomeric means (50) of figures 14 and 15 is capable of biasing the first and second body members into a closed position; further, the elastomeric means (50), the first and second bodies (100a, 100b) of figure 22 recited in col. 9, lines 62-65 are similar to the ones in figures 14 and 15, therefore, the elastomeric means (50) of figures 14,15 would bias the first and second bodies into a closed position in the same way as described in col. 9, lines 62-65.

In rebuttal, and as pointed out in exhaustive detail above, in none of the embodiments of the Takashima device is the elastomeric means (14, 50) capable of biasing the first and second members into a closed position. In this regard, Appellant respectfully submits that the Examiner has adopted an interpretation of Takashima which is wholly unsupportable as a matter of scientific fact. More particularly, the Examiner conspicuously avoids discussion of the evidence manifested in Exhibit A which clearly undermines the Examiner's position. Exhibit A plainly reveals that the Takashima device is diametrically opposite in construction and operation to the

present invention. That is, the series of photos in Exhibit A lead one of ordinary skill in the art to the inescapable conclusion that the elastic band 14, 50 in the Takashima device biases the first and second bodies into an open rather than a closed position. Therefore, the Takashima device does not anticipate, suggest or render obvious the hair holding device and method of use thereof defined in independent claims 1 and 20 on appeal.

Second, the Examiner states (with emphasis added):

In response to applicant's argument that Takashima device does not secure hair when open, a recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the structure is capable of performing the intended use, then it meets the claim.

Responsive to this point, Appellant offers the following. Appellant's argument -- reiterated above -- that the Takashima device does not and cannot secure hair when open (i.e., if it is not manually squeezed shut by a wearer) is again presented to the Board to underscore one of the essential differences between Appellant's device and Takashima. It arises, in fact, as a direct result of the structural differences between Appellant's device and Takashima as expressly set forth in the claims on appeal. Consequently, and contrary to the Examiner's assertion, the Takashima device is not capable of performing the so-called intended use, and, therefore, does not and cannot "meet the claim".

Accordingly, Appellant submits that the outstanding Section 102(b) rejection of independent apparatus claim 1, its dependent claims 2, 3, 5-10, 12-14 and 17-19, and independent method claim 20 in reliance upon Takashima is improper and should be reversed.

(2) Rejection of Claims 15 and 16 under  
35 U.S.C. § 103(a) as being unpatentable  
over Takashima in view of Mooneyhan

Claims 15 and 16 stand rejected under 35 U.S.C. §103(a) as being unpatentable over Takashima in view of Mooneyhan. Such rejection is respectfully traversed.

Appellant does not dispute that the Mooneyhan patent discloses a hair holding device whose first and second body members have squeezable handle portions for opening the device. These are common and well known features in hair holding apparatus. More importantly, Mooneyhan fails to overcome the many serious deficiencies of the Takashima patent in relation to Appellant's independent claims 1 and 20 discussed at length hereinabove. Therefore, since no combination of the teachings of Takashima and Mooneyhan can produce the invention recited in Appellant's independent claim 1, those references likewise cannot be combined to produce the invention called for in dependent claims 15 and 16. Consequently, Appellant submits that the outstanding Section 103(a) rejection of claims 15 and 16 is improper and should be reversed.

(3) Rejection of Claims 4, 7 and 11  
under 35 U.S.C. § 103(a) as  
being unpatentable over Takashima

Since it has been clearly shown that Takashima does not in fact disclose or suggest the invention defined in independent claim 1 -- and, in fact, leads one directly away therefrom -- Takashima does not and cannot disclose or suggest the invention prescribed in dependent claims 4, 7 and 11.


Accordingly, Appellant submits that the outstanding Section 103(a) rejection of independent claims 4, 7 and 11 is improper and should be reversed.

To conclude, Appellant's claims and the evidence provided in Exhibit A must be interpreted fairly and accurately. Additionally, the teachings of the prior art cited against the claims on appeal must be fairly and accurately interpreted for what they in fact disclose and/or suggest. The disclosures of the cited references, when so interpreted, do not disclose or suggest Appellant's claimed invention. Particularly in light of Exhibit A, the claimed invention is not anticipated by the prior art nor would it have been considered obvious to one skilled in this art at the time of Appellant's invention. Accordingly, it is respectfully submitted that the Final Rejection of claims 1-20 should be reversed.

Respectfully submitted,

BRUCE A. ROGERS

Date: January 16, 2009

  
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VIII. APPENDIX

The claims on appeal are as follows:

1. A hair holding device comprising:

a first body member and a second body member, said first and second body members comprising hair gripping portions;

hinge means for pivotally connecting said first and second body members; and

elastomeric means in contact with said first and second body members for biasing said first and second body members into a closed position and for conforming to gathered strands of a user's hair when said hair gripping portions come into contact with gathered strands of a user's hair.

2. The hair holding device of claim 1 wherein said elastomeric means comprise at least one finite length elastomeric strand having first and second ends.

3. The hair holding device of claim 2 further comprising means at said first and second ends for connecting said at least one elastomeric strand to said first and second body members.

4. The hair holding device of claim 2 further comprising means for permanently connecting said at least one elastomeric strand to said first and second body members.

5. The hair holding device of claim 2 further comprising means for removably connecting said at least one elastomeric strand to said first and second body members.

6. The hair holding device of claim 1 wherein said elastomeric means comprise at least one continuous elastomeric band.

7. The hair holding device of claim 6 further comprising means for permanently connecting said at least one elastomeric band to said first and second body members.

8. The hair holding device of claim 6 further comprising means for removably connecting said at least one elastomeric band to said first and second body members.

9. The hair holding device of claim 6 wherein said at least one elastomeric band contacts said first and second body members in a looped configuration.

10. The hair holding device of claim 6 wherein said at least one elastomeric band contacts said first and second body members in a laced configuration.

11. The hair holding device of claim 1 wherein said elastomeric means is permanently connected to said first and second members.

12. The hair holding device of claim 1 wherein said elastomeric means is removably connected to said first and second members.

13. The hair holding device of claim 1 further comprising additional means for biasing said first and second body members into a closed position.

14. The hair holding device of claim 13 wherein said additional means for biasing comprise a torsion spring having a first end

in contact with said first body member and a second end in contact with said second body member.

15. The hair holding device of claim 14 wherein said first and second body members further comprise handle portions that are squeezable by a user to separate said hair gripping portions of said first and second body members, and wherein said first end of said torsion spring is in contact with said handle portion of said first body member and said second end of said torsion spring is in contact with said handle portion of said second body member.

16. The hair holding device of claim 1 wherein said first and second body members further comprise handle portions that are squeezable by a user to separate said hair gripping portions of said first and second body members.

17. The hair holding device of claim 1 wherein at least one of said first and second body members further comprise fulcrum means for contacting said elastomeric means and for easing opening and closing of said device as said first and second body members are moved between closed and open positions.

18. The hair holding device of claim 17 wherein fulcrum means comprise at least one protrusion extending from a hinge axis of said hinge means toward said elastomeric means.

19. The hair holding device of claim 18 wherein said at least one protrusion is at least one connecting lug of said hinge means.



20. A method of improving the hair holding capability of a hair holding device, said method comprising the steps of:

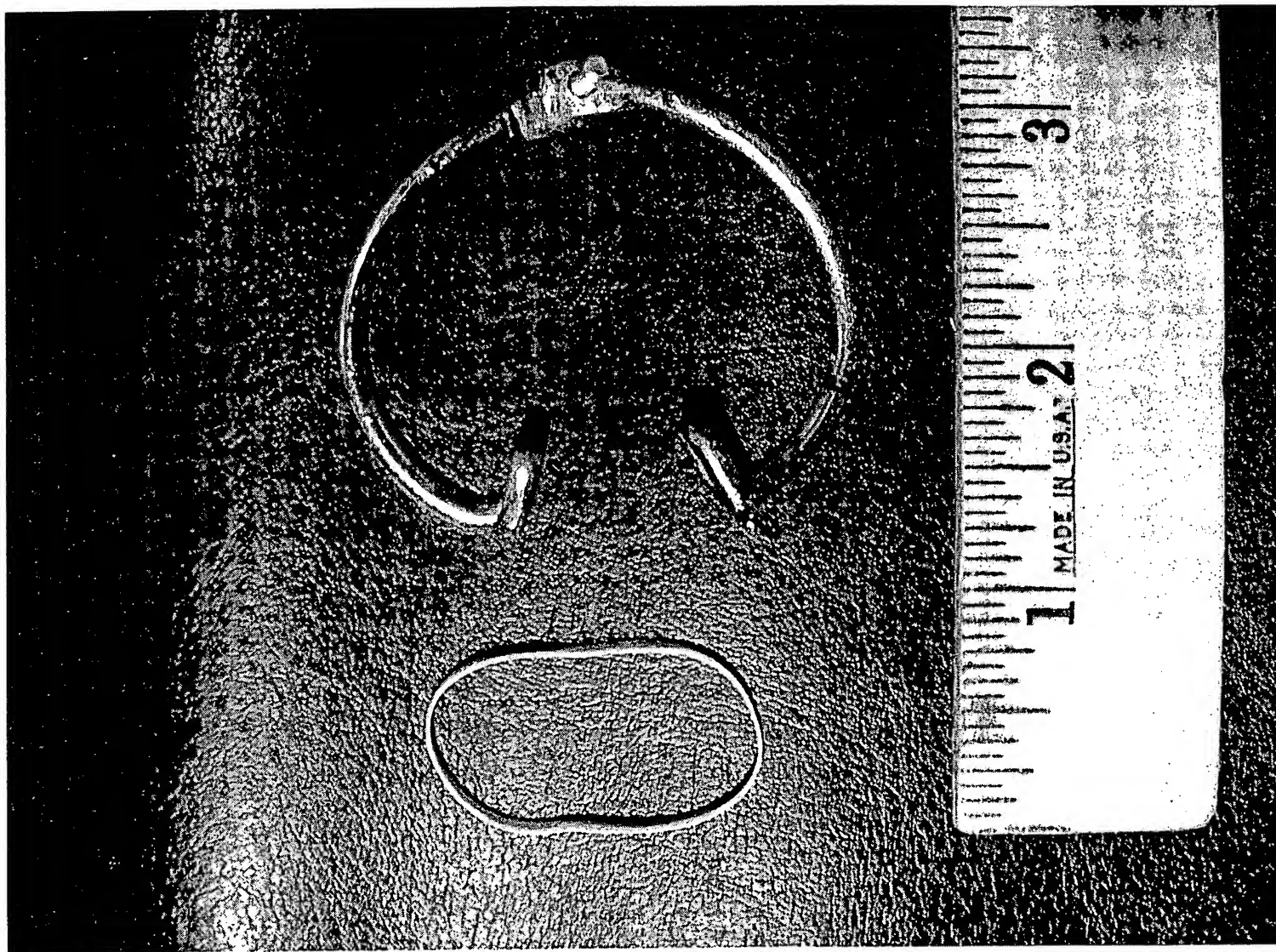
selecting a hair holding device comprising first and second pivotally connected body members, said first and second body members comprising hair gripping portions; and

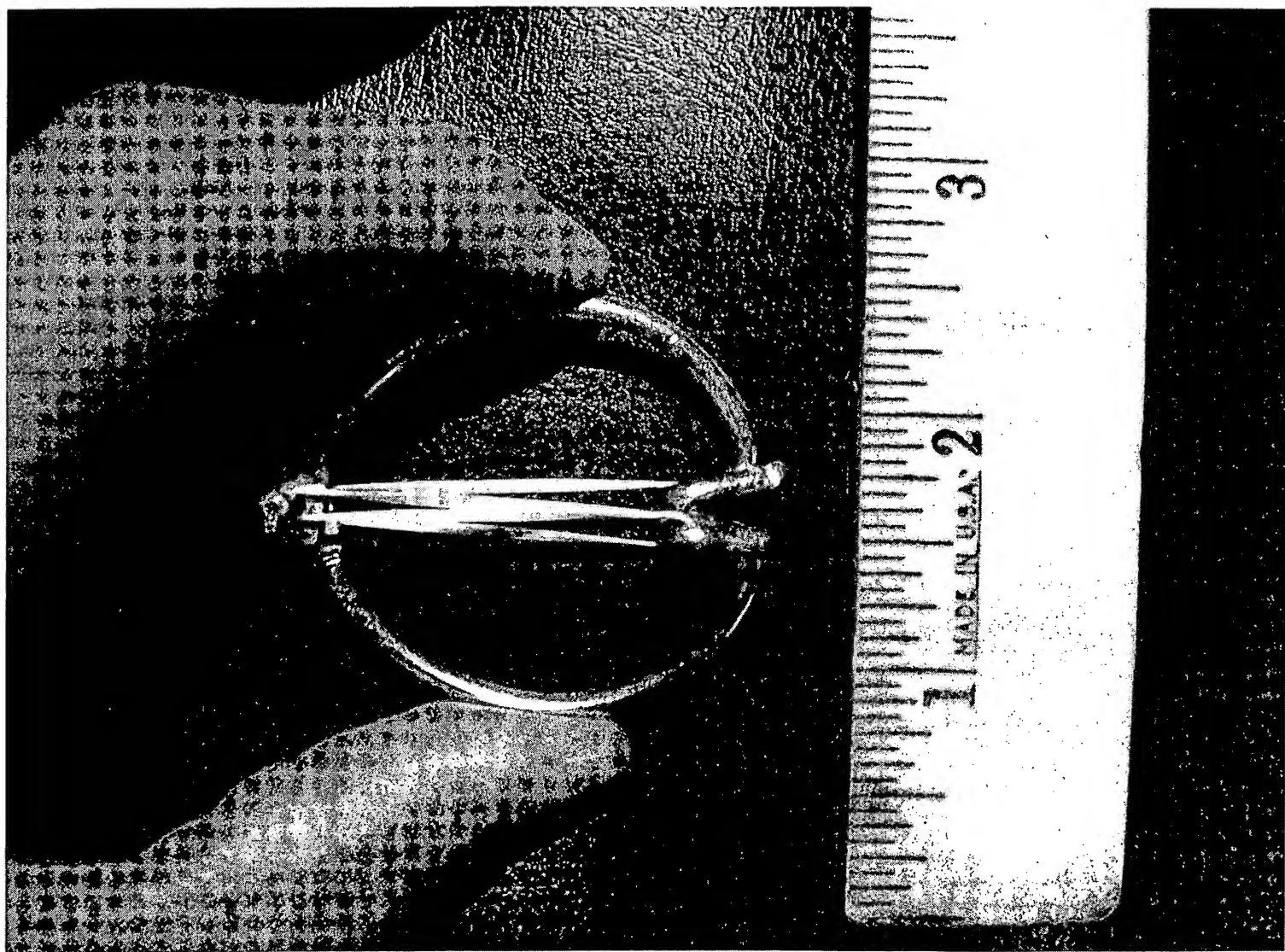
providing said first and second body members with elastomeric means for biasing said first and second body members into a closed position and for conforming to gathered strands of a user's hair when said hair gripping portions come into contact with gathered strands of a user's hair.

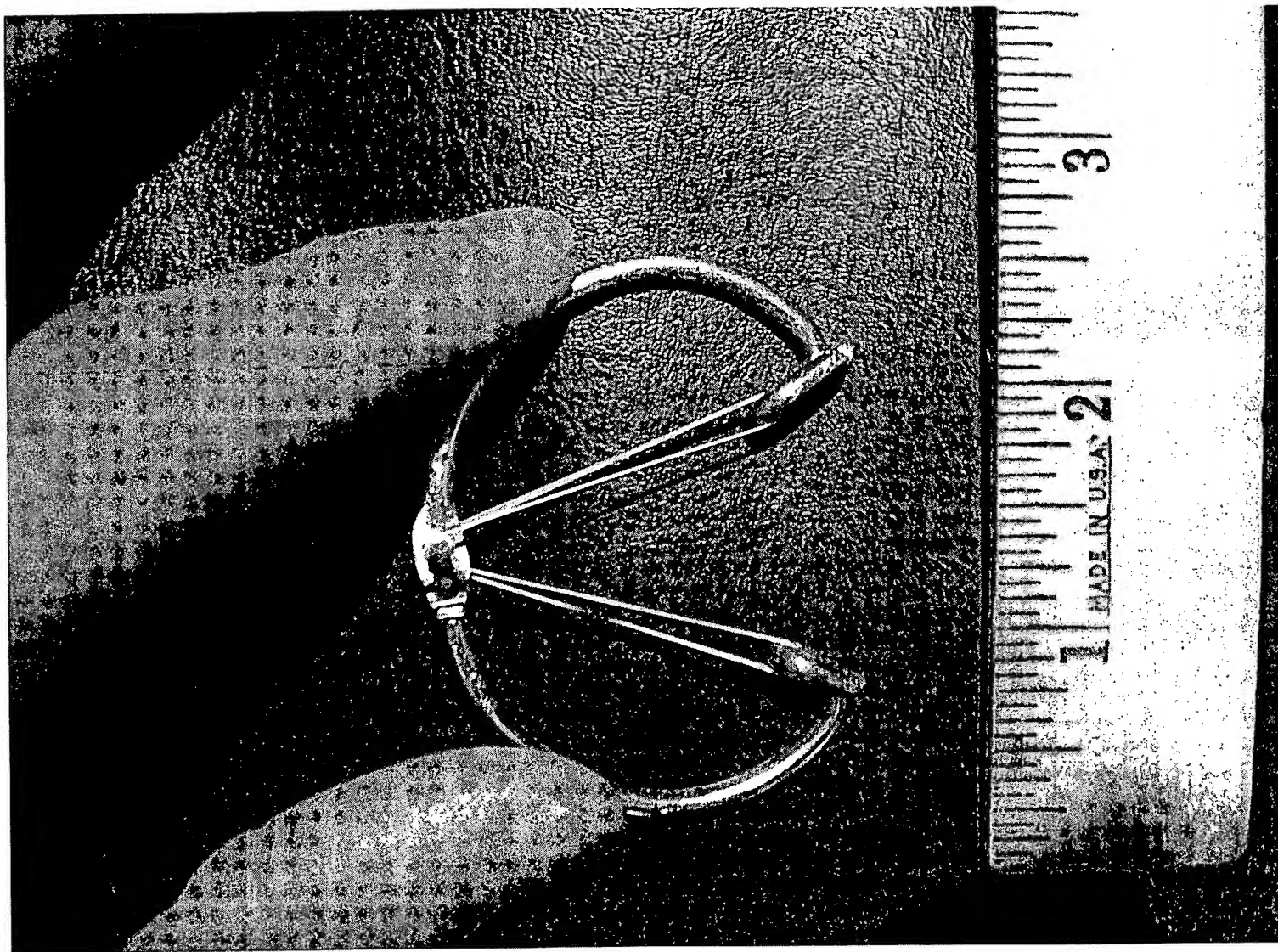
IX. EVIDENCE APPENDIX

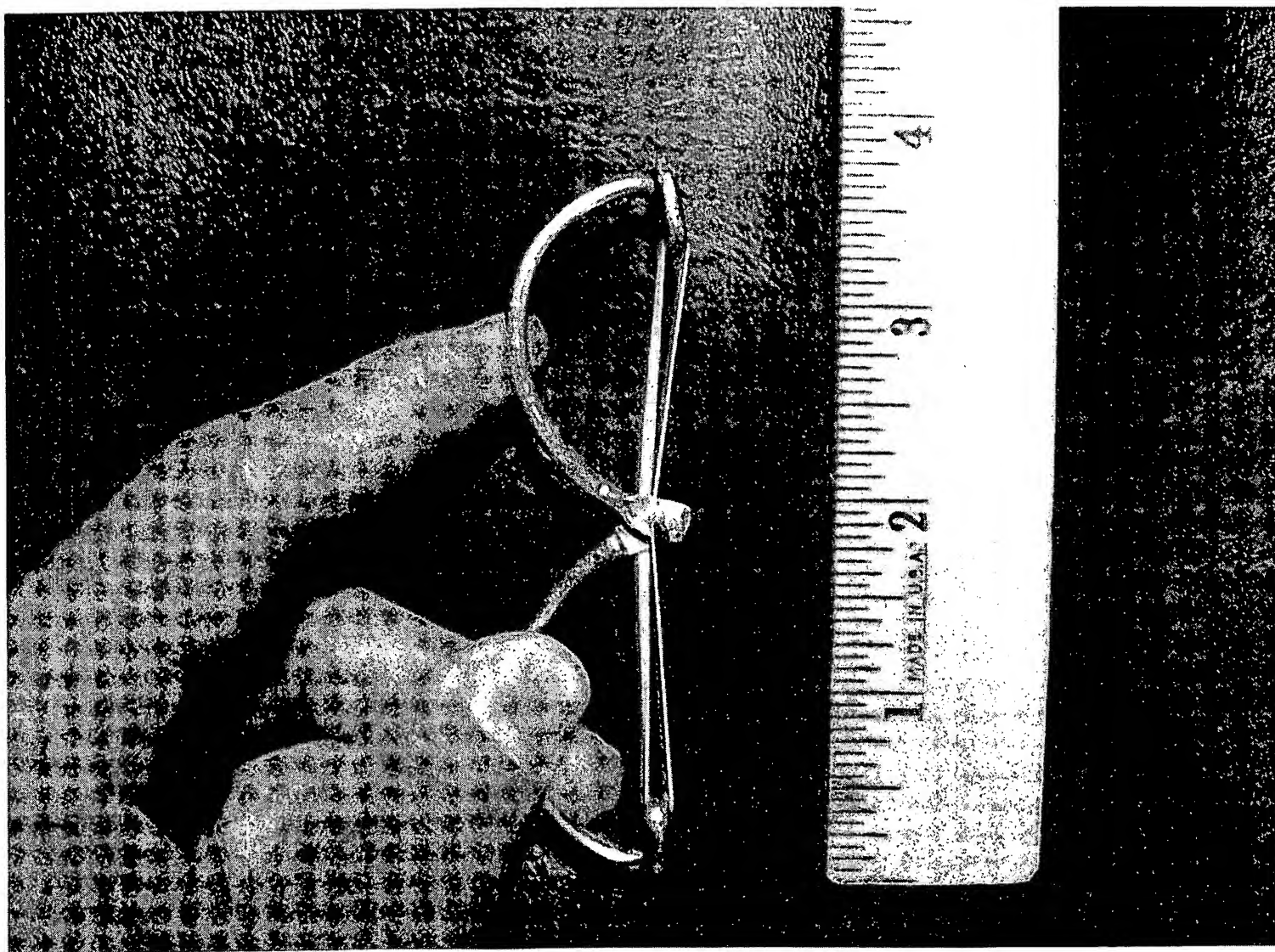
1. Exhibit A

Exhibit A consists of a series of five (5) color copies of digital photographs of a model of a device replicating the motion of the hair clip disclosed in the primary reference cited against the claims on appeal, U.S. Patent No. 5,535,765 (Takashima). The model photographed in Exhibit A was made by Appellant for the purpose of providing the USPTO with clear and convincing physical evidence of the fundamental structural and functional differences between the Takashima device and that prescribed in the claims on appeal. The series of photographs in Exhibit A were previously presented to the Examiner as an attachment to a November 7, 2007 "Request for Reconsideration" filed by Appellant in response to a non-final Office Action dated August 8, 2007.

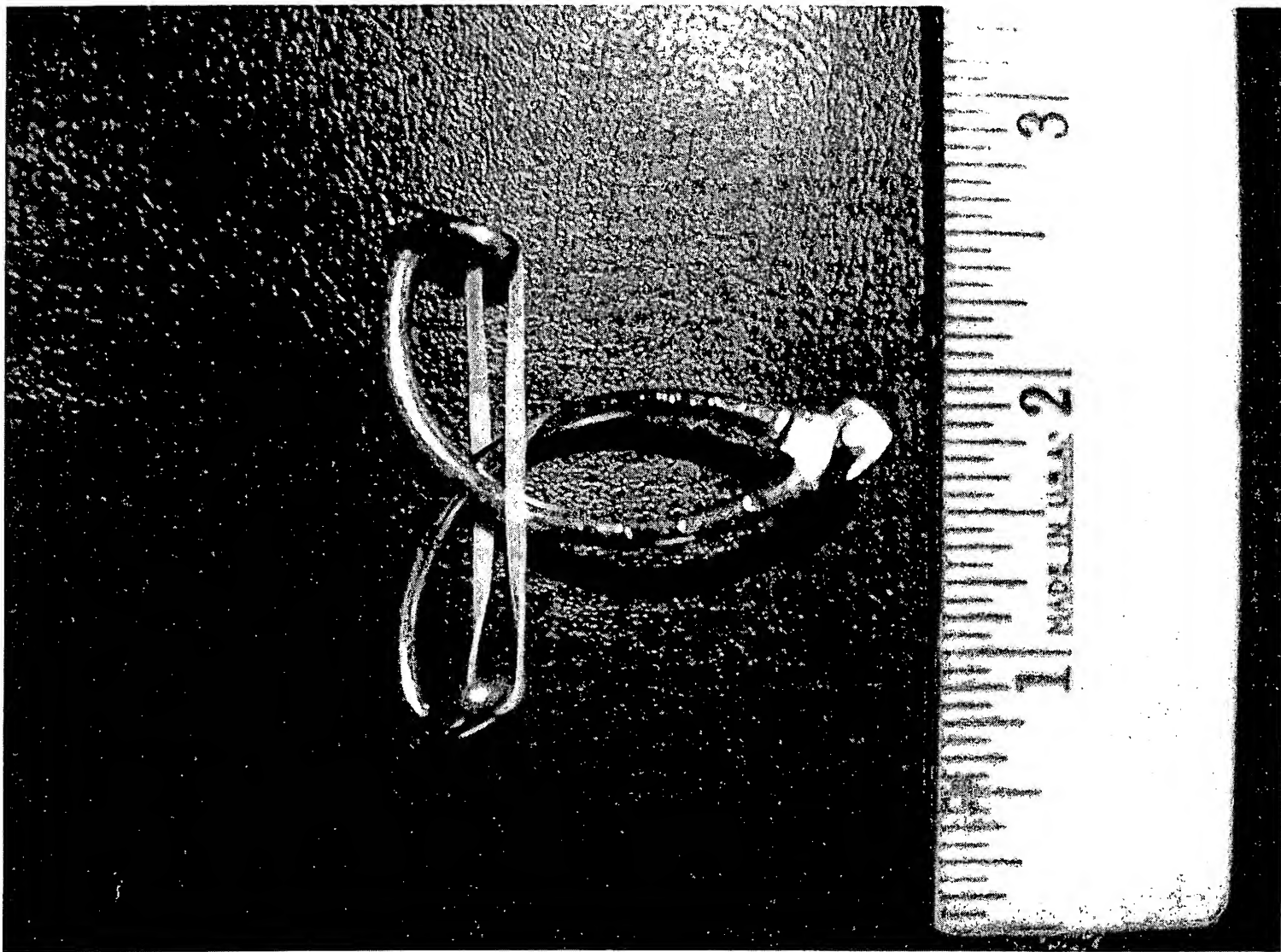












X. RELATED PROCEEDINGS APPENDIX

1. An appeal brief was filed in co-pending application no. 10/763,846 was a related appeal, however a notice of allowance was sent out in response to the brief.

2. An appeal brief was filed in co-pending application no. 10/764,237.

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